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7 **UNITED STATES DISTRICT COURT**  
8 **SOUTHERN DISTRICT OF CALIFORNIA**  
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10 SEAN HARDING, individually and on  
11 behalf of other members of the general  
public similarly situated,

CASE NO. 09cv1212-WQH-WMC  
ORDER

12 Plaintiff,  
13 vs.  
14 TIME WARNER, INC., a Delaware  
Corporation; and DOES 1-50, Inclusive,  
15 Defendants.

16 HAYES, Judge:

17 The matter before the Court is the Motion for Leave to Amend the Complaint, filed by  
Plaintiff. (Doc. # 14).

18 **I. Background**

19 On June 4, 2009, Plaintiff filed a Complaint with three counts, each a purported  
20 collective or class action brought on behalf of current and former employees of Defendant.  
21 (Doc. # 1). The Complaint alleged that Defendant's wage payment practices violate the Fair  
22 Labor Standards Act of 1938 ("FLSA"), 29 U.S.C. §§ 201 et seq., the California Labor Code,  
23 §§ 204 and 218, and California Business and Professions Code § 17200.

24 On June 30, 2009, Time Warner filed a Motion to Dismiss the Complaint pursuant to  
25 Federal Rule of Civil Procedure 12(b)(6). (Doc. # 6).

26 On August 18, 2009, the Court granted the Motion to Dismiss and dismissed the  
27 Complaint without prejudice. (Doc. # 10). The Court concluded that the Complaint failed to  
28 satisfy the pleading standards of Federal Rule of Civil Procedure 8.

1       On September 2, 2009, Plaintiff filed a Motion for Leave to Amend, accompanied by  
 2 a proposed first amended complaint. (Doc. # 14). According to Plaintiff, the “proposed [first  
 3 amended complaint] sets forth its primary amendments in the factual allegations of Paragraphs  
 4 29 through 34 and 39 through 46. ... Defendant’s practice of ‘rounding’ Class Members’ times  
 5 worked to the nearest quarter-hour violates both federal and California law.” (Doc. # 14 at 2).

6       On September 25, 2009, Defendant filed an opposition to the Motion for Leave to  
 7 Amend. (Doc. # 16). Defendant contends that “Plaintiff’s Motion for Leave to Amend must  
 8 be denied because ... Plaintiff’s Proposed First Amended Complaint is subject to dismissal  
 9 under Rule 12(b)(6), and therefore to allow amendment would be futile.” (Doc. # 16 at 14).

10       On October 2, 2009, Plaintiff filed a reply brief in support of the Motion for Leave to  
 11 Amend. (Doc. # 18).

12 **II. Discussion**

13       Rule 15 of the Federal Rules of Civil Procedure mandates that leave to amend “be freely  
 14 given when justice so requires.” Fed. R. Civ. P. 15(a). “This policy is to be applied with  
 15 extreme liberality.” *Eminence Capital, LLC v. Aspeon, Inc.*, 316 F.3d 1048, 1051 (9th Cir.  
 16 2003) (quotation omitted). In *Foman v. Davis*, 371 U.S. 178 (1962), the Supreme Court  
 17 offered several factors for district courts to consider in deciding whether to grant a motion to  
 18 amend under Rule 15(a):

19       In the absence of any apparent or declared reason—such as undue delay, bad faith  
 20 or dilatory motive on the part of the movant, repeated failure to cure deficiencies  
 21 by amendments previously allowed, undue prejudice to the opposing party by  
 virtue of allowance of the amendment, futility of amendment, etc.—the leave  
 sought should, as the rules require, be ‘freely given.’

22 *Foman*, 371 U.S. at 182; *see also Smith v. Pac. Prop. Dev. Co.*, 358 F.3d 1097, 1101 (9th Cir.  
 23 2004) (citing *Foman* factors).

24       “Not all of the [*Foman*] factors merit equal weight. As this circuit and others have held,  
 25 it is the consideration of prejudice to the opposing party that carries the greatest weight.”  
 26 *Eminence Capital*, 316 F.3d at 1052 (citing *DCD Programs, Ltd. v. Leighton*, 833 F.2d 183,  
 27 185 (9th Cir. 1987)). “The party opposing amendment bears the burden of showing prejudice.”  
 28 *DCD Programs*, 833 F.2d at 187. “Absent prejudice, or a strong showing of any of the

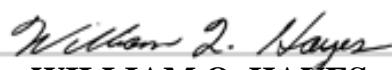
1 remaining *Foman* factors, there exists a *presumption* under Rule 15(a) in favor of granting  
 2 leave to amend.” *Eminence Capital*, 316 F.3d at 1052.

3 “While some courts liken the futility inquiry with that of a motion to dismiss, most  
 4 recognize that ‘[d]enial of leave to amend on [futility] ground[s] is rare.’” *Defazio v. Hollister,*  
 5 *Inc.*, No. Civ. 04-1358, 2008 WL 2825045, at \*2 (E.D. Cal., July 21, 2008) (quoting *Netbula*  
 6 *v. Distinct Corp.*, 212 F.R.D. 534, 539 (N.D. Cal. 2003); citing, *inter alia*, *Big Bear Lodging*  
 7 *Ass’n v. Snow Summit, Inc.*, 182 F.3d 1096, 1105 (9th Cir. 1999) (“Because this litigation is  
 8 still in its early stages, leave should be liberally granted unless amendment would be futile.”)).  
 9 “Ordinarily, courts will defer consideration of challenges to the merits of a proposed amended  
 10 pleading until after leave to amend is granted and the amended pleading is filed.” *Netbula*, 212  
 11 F.R.D. at 539 (citation omitted).

12 Defendant does not contend that the proposed first amended complaint would impose  
 13 undue prejudice or that Plaintiff has exhibited undue delay or bad faith. Defendant’s sole  
 14 argument against granting leave to amend is futility. “In view of Rule 15(a)’s permissive  
 15 standard, courts ordinarily defer consideration of challenges to the merits of a proposed  
 16 amended pleading until after leave to amend is granted and the amended pleading is filed.”  
 17 *Hynix Semiconductor Inc. v. Toshiba Corp.*, No. C-04-4708, 2006 WL 3093812, at \*2 (N.D.  
 18 Cal., Oct. 31, 2006) (“Hynix’s arguments should be addressed in a motion to dismiss or for  
 19 summary judgment, not in an opposition to the present motion for leave to amend.”). After  
 20 reviewing the proposed first amended complaint, the Court finds that this procedure is  
 21 appropriate in this case.

22 **III. Conclusion**

23 IT IS HEREBY ORDERED that the Motion for Leave to Amend is **GRANTED**. (Doc.  
 24 # 14). No later than **twenty (20) days** from the date this Order is filed, Plaintiff may file the  
 25 proposed first amended complaint, attached to the Motion for Leave to Amend as Exhibit B.  
 26 DATED: October 21, 2009

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**WILLIAM Q. HAYES**  
 United States District Judge